89-1639
NO.

Supreme Court, U.S.
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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1990

MURRAY APPLEMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY APPLEMAN
Attorney
A Member of the Bar of the
United States Supreme Court
225 Broadway
39th Floor
New York, NY 10007
(212) 349-6966

Dick Bailey Printers, 203 Port Richmond Avenue ■ Staten Island, NY 10302
Tel.: 1-800-564-4918 — (212) 608-7666 — (718) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. May any federal court, by the use of sanctions, bar the necessary creativity, diligence and zeal involved in effective advocacy, by restraining the ability of an attorney to recommend the claiming of the Fifth Amendment privilege against self-incrimination on behalf of a client, conceded by the Solicitor General in *Garner v. U.S.*, 424 U.S. 648 (1976) to be available with regard to income tax returns, i.e., failure to file, and violating the Supreme Court principles expounded in *Maness v. Meyers,* 419 U.S. 449 (1975) and *Garner, supra* at n. 18 and 21?

2. May sanctions be imposed under Rule 11 when the law is unclear and conflict exists between the circuits?

LIST OF PARTIES

MURRAY APPLEMAN was the attorney for the defendants in the United States District Court, against whom sanctions were imposed and who appealed to the Second Circuit Court of Appeals.

In the courts below the title of the case was: Benjamin Larca, Raymond Rescildo, Salvatore Di Simone, Stephen Fortunato, Frederick Larca, Walter Lipman, James Zimmerman, Michael Salerno, Vincent Bondi and Joseph Filippone, plaintiffs, against United States of America, defendant.

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IN THE
Supreme Court of the United States
OCTOBER TERM 1990

MURRAY APPLEMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY APPLEMAN, attorney, prays that a writ of certiorari issue to review a final judgment and order of the United States Court of Appeals for the Second Circuit decided January 12, 1990 (Appendix A) *infra,* which affirmed the judgment of the United States District Court for the Southern District of New York (Edelstein, David N., J.) imposing sanctions pursuant to Federal Rules of Civil Procedure 11 and sanctions issued by the United States Court of Appeals for the Second Circuit.

THE OPINION OF THE COURT BELOW

The opinion of the court below, namely the United States Court of Appeals for the Second Circuit, affirming

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*Original Title: BENJAMIN LARCA, RAYMOND RESCILDO, SALVATORE DI SIMONE, STEPHEN FORTUNATO, FREDERICK LARCA, WALTER LIPMAN, JAMES ZIMMERMAN, MICHAEL SALERNO, VINCENT BONDI and JOSEPH FILIPPONE,

plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

the decision and judgment is set forth in Appendix A, *infra,* as aforesaid. The U.S. District Court's Opinion and Judgment is set forth in Appendix B.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Second Circuit, the court below, is dated January 12, 1990. Jurisdiction of this court is invoked, made and conferred under 28 U.S.C. §1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 11
Fifth Amendment to the Constitution.

STATEMENT OF THE CASE

Each of ten taxpayers filed an Internal Revenue Service form 1040 with the Internal Revenue Service in 1983 asserting their Fifth Amendment privilege against self-incrimination solely on the line with regard to miscellaneous income as to its source and amount. A penalty pursuant to 26 U.S.C. §6702, frivolous return, was assessed. Counsel then filed ten individual complaints on behalf of the taxpayers. Based on *Paulson v. U.S.,* 758 F.2d 61 (2d Cir., 1986) and *Leogrande v. U.S.,* 811 F.2d 147 (2d Cir.) cert. denied 484 U.S. 819 (1987), summary judgment was granted to the government and sanctions leveled against the attorney for the ten taxpayers involved.

REASONS FOR GRANTING THE PETITION

1. Sanctions in the extant situation, solely based on grounds that taxpayers' basis was not well grounded in fact, warranted by existing law or a good faith argument

for extension, modification or reversal of existing law, directly contradicts this Court's opinion in *Maness v. Meyers, supra* at 465-466, reversing a contempt citation against a lawyer for advising his client not to obey a court order because it found that placing this burden on counsel indirectly restrained the defendant's ability to exercise his Fifth Amendment rights and violative of this Court's ruling in *Garner, supra* at n. 21, stating:

> No language in this opinion is to be read as to allowing a taxpayer desiring the protection of the privilege to make disclosures concurrently with a claim of privilege and thereby to immunize himself against the use of such disclosures. If a taxpayer desires the protection of the privilege, he must claim it instead of making disclosures. Any other rule would deprive the Government of its choice between compelling the evidence from the claimant in exchange for immunity and avoiding the burdens of immunization by obtaining the evidence elsewhere.

See *Mackey v. U.S.*, 401 U.S. at 711-713, 91 S.Ct. at 1169-1171, 28 L.Ed.2d at 431-433 (Brennan, J. concurring in judgment).

2. The circuits are in disarray and in conflict as to the Fifth Amendment effect on income tax returns and the relevant legal standard clearly established by this Court is contravened.

POINT I

WHETHER SANCTIONS HEREIN ARE VIOLATIVE OF THE CONSTITUTION IN THAT THEY INDIRECTLY OBSTRUCT THE ABILITY TO EXERCISE FIFTH AMENDMENT RIGHTS.

It must be deemed uncontroverted that sanctions in this type of situation violate the Constitution in that they obstruct the ability to exercise Fifth Amendment rights and repudiate this Court's ruling in *Garner v. U.S., supra,* n. 18 and 21 and, under these circumstances, are designed as a disincentive to honest and effective representation of one's clients.

In defiance of this Court's ruling in *Maness v. Meyers, supra,* and in an attempt to barricade a defendant's ability to exercise his Fifth Amendment rights with regard to income tax returns, recognized by this Court in *Garner v. U.S., supra,* the Second Circuit has imposed sanctions against a lawyer pursuant to Federal Rules of Civil Procedure 11 despite the fact that an attorney's function is to raise all the just and meritorious defenses his client has. *U.S. v. Judson,* 322 F.2d 460 (C.A. 9, 1963).

A frivolous action is defined as one that is completely without merit in law and fact and cannot be supported by a reasonable argument for extension, modification or reversal of existing law.

Although well-grounded in fact and warranted in existing law (see *U.S. v. Barnes,* 604 F.2d at 147 (2d Cir., 1979) relating the claiming of the Fifth Amendment with regard to amount of income is available or, in the alternative, a good faith argument for the extension, modification or reversal of existing law. Given the role of the Fifth

Amendment throughout our history, courts should be loathe to impose prccedural rules that might impede a defendant's claiming that protection. One cannot imagine a more effective way of chilling putative counsel in recommending the Fifth Amendment protections than the assessment of substantial fees for cases ultimately possibly determined to be without merit. Were a lawyer subject to contempt or sanctions for advising a client to invoke the privilege, he might fail to give such advice and deprive his client of the ability to make the choice. Viewed in this light, the advice becomes an integral part of the protection accorded a witness by the Fifth Amendment. See *Maness v. Meyers, supra.*

POINT II

THE SECOND CIRCUIT'S HOLDING IN *PAULSON v. U.S.*, 758 F.2d 61 (2d Cir., 1985) THAT A BLANKET REFUSAL TO PROVIDE INFORMATION ON A TAX RETURN, BASED UPON A RIGHT AGAINST SELF-INCRIMINATION, WARRANTS A §6702 PENALTY, CONTRAVENES THIS COURT'S PRECEDENT UNDER *GARNER v. U.S., supra,* WHICH SPECIFICALLY PROVIDES FOR NON-FILING OF INCOME TAX RETURNS BASED ON THE FIFTH AMENDMENT IN PROPER CIRCUMSTANCES.

In conflict with this Court's ruling in n. 21, *Garner v. U.S., supra,* that disclosures instead of claiming the Fifth Amendment cannot be permitted, other circuits and courts have held that solely the source, not the amount of income, may be privileged. See *U.S. v. Paepke,* 550 F.2d 385 (7th Cir., 1977); *U.S. v. Goetz,* 746 F.2d 705, 710 (11th Cir., 1984); *U.S. v. Booher,* 641 F.2d 218, 220 (5th Cir.,

1981), holding that the amount of taxpayer's income is not privileged except under limited circumstances i.e., when the amount alone might have incriminated him, failing to recognize that the privilege embraces answers that would furnish a link in the chain of evidence needed to prosecute the claimant for a Federal crime. These holdings derogate this court's precedent under *Garner, supra,* n. 5 and 6, which specifically relates the actions Internal Revenue Service can take if no returns are filed i.e., summons under Title 26 U.S.C. §7602 or immunity under Title 18 U.S.C. §6004.

These cases are contrary to the weight of authority (*Garner v. U.S., supra*) are not persuasive and the relevant legal standard was clearly established by this court.

The Fifth Amendment guarantees that "[n]o person shall be compelled in any criminal case to be a witness against himself." The Amendment has its roots in the framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself, is often an adjunct to tyranny and may lead to the conviction of innocent persons. Thus, a violation of the constitutional guarantees occurs when one is "compelled" by government coercion to bear witness against oneself in the criminal process. See *Colorado v. Connelly,* 479 U.S. 157, 163-164 and n. 1 (1986). The Fifth Amendment privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in other proceeding—civil or criminal, formal or informal—where the answers might incriminate him in future criminal proceedings. *Baxter v. Palmigiano,* (1976) 425 U.S. 308, 96 S.Ct. 1551.

Moreover, the suppression of a defendant's tax return is an inappropriate remedy, even in cases of plain error. See *U.S. v. Claiborne,* 765 F.2d 784 (9th Cir., 1985), citing *Marvin v. U.S.,* 732 F.2d 669, 673 (1984) and *U.S. v. Barnes,* 604 F.2d at 121, 146 (2d Cir., 1979), cert. denied 446 U.S. 907 (1980), thus revealing the attempt to give a Hobson's choice to any taxpayer.

It has long been the rule that "where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced." *U.S. v. Barnes,* 604 F.2d at 147, citing *U.S. v. Jackskion,* 102 F.2d at 683-684 (2d Cir.), cert. denied 307 U.S. 635 (1939) and *U.S. v. Tramunte,* 513 F.2d 1087, 1105 (2d Cir.), cert. denied 423 U.S. 832 (1975). It is proper to show defendants' substantial expenditures on tax returns suggesting no legitimate source.

Disclosures made on tax returns are not compelled incrimination, *Garner v. U.S., supra.*

At page 148, the Second Circuit in *Barnes, supra,* recognized that: "However, as is made clear in *U.S. v. Sullivan,* 274 U.S. 259, 263-264 (1927) the right to make a valid claim of privilege is available even as to amount of taxpayer's income, as well as any other items on the return which could legitimately cause self-incrimination."

See also *Garner v. U.S., supra* at 662-663: "The Fifth Amendment itself guarantees that taxpayers' insulation against liability imposed on the basis of a valid and timely claim of privilege, a protection broadened by §7203's statutory standard of 'willfulness."

As is evident, no legal standard appears to be established.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MURRAY APPLEMAN
Attorney
A Member of the Bar of the
United States Supreme Court
225 Broadway
39th Floor
New York, NY 10007
(212) 349-6966

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of January, one thousand nine hundred and ninety.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND
HONORABLE RICHARD J. CARDAMONE
HONORABLE FRANK X. ALTIMARI

Circuit Judges

BENJAMIN LARCA, RAYMOND RESCILDO, SALVATORE DISIMONTE, STEPHEN FORTUNATO, FREDERICK LARCA, WALTER LIPMAN, JAMES ZIMMERMAN, MICHAEL SALERNO, VINCENT BONDI, and JOSEPH FILIPPONE,

Plaintiffs-Appellants,

-against-

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER
Docket No. 89-6195

Counsel for plaintiffs-appellants, Murray Appleman, appeals from a judgment of the United States District Court for the Southern District of New York (Edelstein, J.), entered June 22, 1989 imposing sanctions against him pursuant to Fed. R. Civ. P. 11.

Appellants are ten taxpayers, each of whom filed an IRS Form 1040 with the Internal Revenue Service in 1983. The returns contained no information regarding income, deductions, or tax owed. The taxpayers asserted that their Fifth Amendment privilege against self-incrimination protected them from being forced to reveal information regarding the amount and source of their income. The IRS assessed a civil penalty of $500 against each of the taxpayers pursuant to 26 U.S.C. §6702, for filing frivolous purported returns. The taxpayers each paid $75 of the penalty. Counsel then filed ten individual complaints on behalf of the taxpayers in the spring of 1986, seeking a refund of the $75 payment.

The government moved for summary judgment pursuant to Fed. R. Civ. P. 56 and for sanctions pursuant to Rule 11. The district court granted the government's reasonable costs and attorney's fees. It found that Appleman had instituted four virtually identical lawsuits in the United States District Court for the District of New Jersey, and nine similar suits in the Eastern District of New York all of which were summarily dismissed and Rule 11 sanctions were imposed. *See Nicolosi v. United States,* No. 85-5285 (D.N.J.), *aff'd,* 811 F.2d 147(2d Cir.), *cert. denied,* 484 U.S. 953 (1987); *Leogrande v. United States,* Civ. No. 85-4109 (E.D.N.Y.), *aff'd* 811 F.2d 147 (2d Cir.)(per curiam), *cert. denied,* 484 U.S. 819 (1987). In order to deter counsel from instituting similar suits in the future, additional Rule 11 sanctions were imposed in the amount of $10,000 or $1,000 for each of the ten frivolous actions to be paid into the registry of the court. The sanctions award is the only part of the judgment appealed from.

The taxpayers' cases were frivolous. A blanket refusal to provide information on a tax return based upon a right

against self-incrimination warrants a §6702 penalty. *E.g., Paulson v. United States,* 758 F. 2d 61 (2d Cir. 1985) Thus, appellants' cases were not well grounded in fact, warranted by existing law or a good faith argument for extension, modification or reversal of existing law. *See* Fed. R. Civ. P. 11; *International Shipping Co. v. Hydra Offshore, Inc.,* 875 F.2d 388, 390 (2d Cir.), *cert. denied,*_____U.S._____, 110 S. determining the nature and amount of the sanction. *Id.* at 392. Deterrence and punishment are among the goals of Rule 11, *see Thomas v. Capital Sec. Servs. Inc.,* 836 . 2d 866, 879 (5th Cir. 1988) (en banc), and the penalty imposed was within the court's discretion.

Additionally, we find this appeal frovolous, and grant the government's request for sanctions pursuant to Fed. R. App. P. 38. Counsel has previously been sanctioned under Rule 11 and Rule 38 for bringing similar appeals, putting him on notice that such claims and appeals lack merit. *See Leogrande, 811 F. 2d at 148.*

The order of the district court is affirmed. Counsel for plaintiffs-appellants is sanctioned $1000 as and for attorney's fees and costs in this Court, which amount is to be paid to the United States Department of Justice within 14 days of the date of this order.

s/Ellsworth A. Van Graafeiland, U.S.C.J.
Ellsworth A. Van Graafeiland, U.S.C.J.

s/Richard J. Cardamone, U.S.C.J.
Richard J. Cardamone, U.S.C.J.

s/Frank X. Altimari, U.S.C.J.
Frank X. Altimari, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B—U.S. DISTRICT COURT'S OPINION AND JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENJAMIN LARCA, RAYMOND RESCILDO, SALVATORE DISIMONE, STEPHEN FORTUNATO, FREDERICK LARCA, WALTER LIPMAN, JAMES ZIMMERMAN, MICHAEL SALERNO, VINCENT BONDI, and JOSEPH FILIPPONE,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

ORDER

86 Civ. 2249, 86 Civ. 3744, 86 Civ. 3745, 86 Civ. 3746
86 Civ. 3747, 86 Civ. 3748, 86 Civ. 3749, 86 Civ. 4150
86 Civ. 4192, 86 Civ. 4193 (DNE)

EDELSTEIN, District Judge:

Contending that the instant cases are baseless and frivolous, the defendant moves for summary judgment and the imposition of sanctions pursuant to Fed. R. Civ. P. 11. The motions are hereby granted.

In the instant consolidated actions, plaintiffs each seek to recover $75 payments they each made to the Internal Revenue Service ("IRS"). The $75 payments[1] were

1. 26 U.S.C. §6703 provides that upon paying at least 15% of a section 6702 penalty, a taxpayer may file an application for a refund of the sum paid. This application serves to stay any action to collect the remainder of the penalty imposed by the IRS.

paid in partial satisfaction of $500 civil penalties imposed by the IRS on each plaintiff for filing frivolous and vexatious tax returns. *See* 26 U.S.C. §6702.

The IRS deemed the returns[2] frivolous in that they contained no information regarding income, deductions or tax owed. On the line of the relevant tax forms labeled "other income," each plaintiff typed "Fifth & Sixth Amendments to Constitution." Further, with one exception,[3] each return was unsigned and undated.

It is questionable that the returns filed are violative of 26 U.S.C. §6701. *See Leogrande v. United States,* 811 F.2d 147 (2d Cir.) (per curiam), *cert. denied,* 108 S.Ct. 75 (1987) (near identical facts as in instant case). Further, the blanket invocation of constitutional protection is clearly frivolous. *See Id.* Moreover, even if the fifth amendment privilege had been validly invoked, it would only excuse the taxpayer from revealing the source of his income, not its amount. *See United States v. Schiff,* 612 F.2d 73, 77 (2d Cir. 1979).

It is clear that plaintiffs' claims are frivolous and calculated to frustrate the government's task of collecting income tax. The plaintiffs' counsel is no stranger to this type of litigation. Four virtually identical suits were brought by this attorney in the District of New Jersey.

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2. The documents in question, partially completed official 1040 tax forms, are clearly tax returns for purposes of 26 U.S.C. §6702. *See Leogrande v. United States,* 811 F.2d 147, 149 (2d Cir.) (per curiam), *cert. denied,* 108 S.Ct. 75 (1987).

3. The return of Michael Salerno is signed "Alyce Appleman."

Shortly before the government brought the instant motion, each New Jersey case was summarily dismissed and sanctions, pursuant to Fed. R. Civ. P. 11, were imposed. Soon after the filing of the instant motion, plaintiff's counsel had summary judgment granted against him in a virtually identical case heard in the Eastern District of New York. As in New Jersey, in the New York case, Rule 11 sanctions were imposed. On appeal, the Second Circuit not only upheld the imposition of sanctions and the granting of summary judgment in favor of the government, the Appellate Court also imposed sanctions itself pursuant to Fed. R. App. P. 38. *See Leogrande v. United States,* 811 F.2d 147, 149 (2d Cir.) (per curiam), *cert. denied,* 108 S.Ct. 75 (1987).

Plaintiffs' counsel, by common sense and personal experience, knew of the frivolity of the instant cases. Nevertheless, he litigated these cases through a motion for summary judgment. There is no reason why the American public should pay for this abuse of the judicial process. Pursuant to Fed. R. Civ. P. 11, it is ordered that plaintiffs' counsel be sanctioned in the amount of defendant's reasonable costs and attorney's fees. In addition, plaintiffs' counsel is to be sanctioned in the amount of $10,000, that is, $1,000 for each of the 10 frivolous actions consolidated before this court. This sanction, which is to be paid to the registry of the court, is necessitated by the fact that prior sanctions of attorney's fees alone have not dissuaded plaintiffs' counsel from pursuing essentially identical, frivolous actions.

Whereas the instant actions are baseless, the defendant's motion for summary judgment is granted. Defendant shall submit a proposed judgment and affidavits

detailing the relevant expenses incurred by reason of these cases.

SO ORDERED

Dated: New York, New York
June 2, 1988

s/ David N. Edelstein
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BENJAMIN LARCA, RAYMOND RESCILDO, SALVATORE DISIMONE, STEPHEN FORTUNATO, FREDERICK LARCA, WALTER LIPMAN, JAMES ZIMMERMAN, MICHAEL SALERNO, VINCENT BONDI, and JOSEPH FILIPPONE,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

ORDER

86 Civ. 2249, 86 Civ. 3744, 86 Civ. 3745, 86 Civ. 3746
86 Civ. 3747, 86 Civ. 3748, 86 Civ. 3749, 86 Civ. 4150
86 Civ. 4192, 86 Civ. 4193 (DNE)

These actions having been consolidated before the Honorable David N. Edelstein, United States District Judge, and the defendant having moved for summary judgment and for sanctions, and the Court having duly granted such motions in its Order dated June 2, 1988, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. The complaint in each action is dismissed with prejudice, and the defendant is awarded judgment against the plaintiffs.

2. Pursuant to Rule 11 of the Federal Rules of Civil Procedure, plaintiffs' counsel herein, Murray Appleman, Esq., shall pay $4,845.75 to the defendant, that is, the defendant's reasonable costs and attorney's fees.

3. Pursuant to Rule 11 of the Federal Rules of Civil Procedure, plaintiffs' counsel herein, Murray Appleman, Esq., shall pay $10,000 to the registry of the Court, that is, $1,000 for each of the ten frivolous actions consolidated before this Court.

Dated: New York, New York
June 21, 1989

s/ David N. Edelstein
UNITED STATES DISTRICT JUDGE

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By Diana Rampa
Deputy Clerk